

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON,
WASHINGTON DEPARTMENT
LICENSING, et al.

Plaintiffs,

v.

THE TRIBAL COURT FOR THE
CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA
NATION, and its CHIEF TRIBAL
COURT JUDGE TED STRONG, and
the CONFEDERATED TRIBES
AND BANDS OF THE YAKAMA
NATION, a Federally Recognized
Tribe,

Defendants.

NO. CV-12-3152-LRS

**ORDER DENYING
CROSS-MOTION FOR
PRELIMINARY INJUNCTION**

BEFORE THE COURT is the Defendant Confederated Tribes And Bands Of The Yakama Nation's (referred to herein as "Yakama Nation" or "Nation") Cross-Motion For Preliminary Injunction (ECF No. 44). The motion was heard with telephonic oral argument on January 31, 2013.

BACKGROUND

The 1994 Consent Decree entered by this court was the result of an action filed by the Yakama Nation in 1993 (CY-93-3050-AAM) which invoked this court's federal question jurisdiction to adjudicate disputes involving treaties between Indian tribes and the United States. In 2004, the Yakama Nation filed a

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1 petition (CV-04-3079-CI) to invoke this court's continuing jurisdiction under
2 the Consent Decree to enforce the terms of said decree. That petition resulted in
3 the 2006 modification of the Consent Decree embodied in a document titled
4 "Settlement Agreement, Agreed Changes To Consent Decree, And Order."

5 On January 10, 2013, this court entered an order (ECF No. 75) granting a
6 preliminary injunction to the Plaintiffs (referred to herein as the "State of
7 Washington" or "State"), preliminarily enjoining any further proceedings in
8 Yakama Nation Tribal to enforce the Consent Decree (compel the State to
9 continue with mediation), finding that this federal court has exclusive express
10 and inherent jurisdiction over its Consent Decree.

11 12 **DISCUSSION**

13 "A [party] seeking a preliminary injunction must establish that [it] is
14 likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the
15 absence of preliminary relief, that the balance of the equities tips in [its] favor,
16 and that an injunction is in the public interest." *Winter v. Natural Resources*
17 *Defense Council*, 555 U.S. 7, 129 S.Ct. 365, 374 (2008). "A preliminary
18 injunction is an extraordinary remedy never awarded as of right." *Id.* at 376.

19 Whether the State has properly terminated the Consent Decree is the
20 subject of the Yakama Nation's cross-motion for preliminary injunction which
21 seeks to compel the State to engage in further mediation with the Nation.¹ The
22 Yakama Nation contends the State has breached the Consent Decree because it
23 has not abided by Paragraph 4.7d which provides in relevant part:

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25 ¹ The Yakama Nation has filed a "Limited Answer And Affirmative
26 Defenses" (ECF No. 76), without waiving its challenge to the jurisdiction of
27 this court.

Both parties shall pursue the mediation process in good faith until the dispute is resolved or until the mediator determines that the parties are not able to resolve the dispute.

The Nation contends the State has not pursued the mediation process in good faith because the mediator has yet to formally declare an impasse.² According to the Nation, the State must mediate with the Nation in good faith until: 1) the dispute is resolved successfully, or 2) until the mediator determines that the parties are not able to resolve the dispute. Per the Nation, these are the only two possibilities, and until the mediator formally declares an impasse, the State cannot terminate the Consent Decree.

Paragraph 4.7d of the Consent Decree was amended in 2006 to add a new sentence as follows:

If the dispute is not resolved by mediation, the parties may agree to have a neutral third party or arbitrator make a final binding decision resolving the dispute **or, if a dispute is unresolved for more than 180 days, either party may give notice of intent to terminate this agreement as provided for *infra*.**

(Emphasis added).

The “*infra*” refers to Paragraph 4.27 which was added to the Consent Decree in 2006. It provides:

Amendments to the Consent Decree shall be considered upon the written request of either party. Disputes regarding requests for amendment of this Consent Decree shall be subject to the dispute resolution process in Paragraph 4.7 of this Consent Decree. **The agreement and processes embodied in this Consent Decree shall remain in effect unless and until such time as: (a) the parties mutually agree in writing that the decree should be vacated or terminated and superseded by a new agreement between the parties; or (b) if a party objects to continued participation in the processes and framework provided for in this decree and desires to withdraw and terminate the agreement, it may do so only upon not less than one hundred eighty (180) days written**

²At oral argument, counsel for the Nation confirmed the sole basis for its motion is that the State commenced the captioned action prematurely without the mediator making a formal declaration of impasse.

1 **notice to the other party and a government to government**
2 **meeting or consultation between them occurs to discuss their**
3 **proposed reasons for doing so.**

4 (Emphasis added).

5 The State contends it complied with Paragraph 4.7d because the parties’
6 dispute remained unresolved for more than 180 days and it gave notice of intent
7 to terminate the Consent Decree.

8 The Nation is not likely to succeed on the merits. It is not likely to
9 establish the State improperly terminated the Consent Decree because it did not
10 await formal declaration of impasse by the mediator. The Nation reads
11 Paragraph 4.7d, and in particular the first sentence of that paragraph (“[b]oth
12 parties shall pursue the mediation process in good faith until the dispute is
13 resolved or until the mediator determines that the parties are not able to resolve
14 the dispute”), in isolation from Paragraph 4.27. The “*infra*” in the last sentence
15 of Paragraph 4.7d (“[i]f the dispute is not resolved by mediation, the parties may
16 agree to have a neutral third party or arbitrator make a final binding decision
17 resolving the dispute or, if a dispute is unresolved for more than 180 days, either
18 party may give notice of intent to terminate this agreement as provided for
19 *infra*”) is a clear reference to Paragraph 4.27.³ It is apparent from Paragraph
20 4.27 that while the parties are required to pursue mediation in good faith while
21 it is ongoing, they are not obliged to engage in mediation indefinitely, and are
22 not obliged to await a formal declaration of impasse by the mediator before
23 considering mediation completed.

24 The reference in Paragraph 4.27 to “[t]he agreement and processes
25 embodied in this Consent Decree” clearly pertains to “the dispute resolution

26 ³ Indeed, it is noted that in the Nation’s opening memorandum (ECF No.
27 45), it made no mention of Paragraph 4.27.

1 process in ¶ 4.7" of which mediation is a mandatory and integral component.
2 Per Paragraph 4.27, the "processes embodied in this Consent Decree shall
3 remain in effect unless and until such time as . . . a party objects to continued
4 participation" therein and desires to withdraw from and terminate the Consent
5 Decree, and does so upon satisfaction of certain conditions precedent, none of
6 which is that the mediator formally declare an impasse. Were Paragraph 4.27
7 read to require formal declaration of impasse by a mediator, it would duplicate
8 what is set forth in Paragraph 4.7d and be rendered mere surplusage. Paragraph
9 4.7d would not need to provide for anything "*infra*" if its reference to a "dispute
10 . . . not resolved by mediation" or "unresolved for more than 180 days" means
11 that the mediator formally declared an impasse and the parties may now (after
12 180 days have passed), give notice of intent to terminate the Consent Decree.
13 Any additional conditions precedent to notice of intent to terminate the Consent
14 Decree could have been provided in Paragraph 4.7d without need of a detailed
15 separate provision (Paragraph 4.27).

16 Furthermore, requiring the parties to wait 180 days after a mediator's
17 formal declaration of impasse to provide notice of intent to terminate does not
18 make sense in light of the dispute resolution procedures and attendant time lines
19 set forth in the Consent Decree. Pursuant to Paragraph 4.7a of the Consent
20 Decree, the State invoked the dispute resolution process in a March 16, 2011
21 letter to the Yakama Nation. (Ex. I to ECF No. 6). As required by Paragraph
22 4.7b., the State and the Yakama Nation then had a face-to-face meeting on June
23 13, 2011 in Cle Elum. (ECF No. 6 at Paragraph 41).⁴ Another face-to-face
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25 ⁴Paragraph 4.7b requires the face-to-face meeting occur within 30 days of
26 the written notice invoking the dispute resolution process, but obviously the
27 parties' first face-to-face meeting did not occur within that time frame.
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1 meeting occurred on September 14, 2011 in Yakima, but no progress was made.
2 (ECF No. 6 at Paragraph 46). Because the parties were unable to resolve their
3 dispute within 60 days of the written notice provided by the State on March 16,
4 2011, invoking the dispute resolution process, Paragraph 4.7c. required the
5 parties to engage the services of a mediator.⁵ The parties eventually did this, as
6 explained below. In conformance with Paragraph 4.7d., the State, in a letter to
7 the Yakama Nation dated September 19, 2011 (Ex. M to ECF No. 6), provided
8 written notice of its intention to terminate the Consent Decree because the
9 parties' dispute had remain unresolved for more than 180 days (since March 16,
10 2011). The letter advised, however, that "[i]n keeping with the spirit and letter
11 of the Consent Decree, DOL [Department of Licensing] is willing to continue
12 negotiations with the Yakama Nation during the 180 day termination period and
13 we remain hopeful an agreement will be reached." The parties then engaged the
14 services of a mediator as required by Paragraph 4.7c, and mediation efforts took
15 place within this "180 day termination period." (ECF No. 6 at Paragraph 49).
16 A mediation session occurred on March 23, 2012 on the Chehalis Indian
17 Reservation and the parties continued discussions with the mediator during the
18 spring, summer and fall of 2012. The mediation efforts constituted the
19 "government to government meeting or consultation" between the State and the
20 Yakama Nation required by Paragraph 4.27. On December 5, 2012, the date of
21 the State's letter to the Yakama Nation advising that it considered the Consent
22 Decree terminated as of that date (Ex. 1 to ECF No. 60), more than 180 days

24 ⁵ "If the parties are unable to resolve the dispute within sixty (60) days of
25 the date written notice described in ¶4.7.a, the parties **shall** engage the services
26 of a mutually-agreed-upon qualified mediator to assist them in attempting to
27 negotiate the dispute." (Emphasis added).

1 had passed since the State first advised in its letter of September 19, 2011 of its
2 intent to terminate the Consent Decree. Accordingly, the State provided the 180
3 days notice required by Paragraph 4.7d and Paragraph 4.27.

4 The State complied with all of the provisions of Paragraph 4.7 relating to
5 the dispute resolution process and complied with Paragraph 4.27 relating to
6 termination of the Consent Decree. The Consent Decree contemplates the entire
7 dispute resolution process, including mediation, can potentially be completed
8 within 180 days. This is not unrealistic considering that had the 30 day and 60
9 day deadlines specified in Paragraph 4.7a and 4.7b been strictly adhered to by
10 the parties, there would still have been 120 days for mandatory mediation to
11 take place before the State was entitled to provide notice of intent to terminate
12 the Consent Decree due to the parties' dispute having remained unresolved for
13 more than 180 days.

14 Per the plain language of the Consent Decree, a formal declaration of an
15 impasse by a mediator is not a prerequisite to termination.⁶ The Consent
16 Decree can be terminated so long as a dispute has been unresolved for a period
17 of more than 180 days, written notice of proposed termination is provided, and
18 there is a government to government meeting or consultation which occurs to
19 discuss the reasons for the proposed termination. The parties are obliged to
20 comply with the dispute resolution process, but such compliance does not
21 require waiting for a mediator's formal declaration of impasse. Per the Consent
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23 ⁶ Paragraph 4.6 prevents either party from petitioning this court to enforce
24 the decree unless "the dispute resolution process described in ¶4.7 has been
25 followed in good faith to completion without successful resolution." Paragraph
26 4.6 does not define "completion" as requiring a formal declaration of impasse
27 by a mediator.
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1 Decree, a dispute could be “unresolved” without there having been a mediator’s
2 formal declaration of impasse.⁷ Through Paragraph 4.27, the parties provided
3 themselves an “out” in the event a dispute remained unresolved for in excess of
4 180 days.

5 Because the Nation is not likely to succeed on the merits, the other
6 preliminary injunction factors (likelihood of irreparable harm, balance of the
7 equities, and public interest) are of no significant consequence. Nonetheless,
8 consideration of those factors does not compel issuance of a preliminary
9 injunction. The Nation asserts it is irreparably harmed by being deprived of a
10 right to mediate and by being haled into this court to answer the State’s claim
11 that it has properly terminated the Consent Decree. These assertions do not
12 persuade in light of this court’s finding that the Nation is not likely to succeed
13 on its contention that the State is required to continue mediating its dispute with

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23 ⁷ Although the mediator did not formally declare an impasse, he commented
24 in his November 28, 2012 e-mail to counsel that “it seems obvious to me that
25 we are reaching the end of negotiations” and he recognized “that the parties are
26 more likely to be moving beyond the mediation phase in the near future.” (Ex.
27 A to ECF No. 7).

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1 the Nation pending a formal declaration of impasse by the mediator.⁸ The
2 balance of the equities does not tip in favor of the Nation. At most, the equities
3 are equal between the parties considering the record indicates that for at least
4 several years now, the Nation has not complied with the audit requirements of
5 the Consent Decree which would enable the State to determine if it has collected
6 all of the taxes to which it is entitled. It follows that it is not in the public
7 interest that a preliminary injunction be issued in favor of the Nation.

8 9 **CONCLUSION**

10 The Yakama Nation's Cross-Motion For Preliminary Injunction (ECF No.
11 44) is **DENIED**.

12 The Nation's Motion To Dismiss (ECF No. 67), filed January 6, 2013,
13 will be heard without oral argument once briefing is completed. The court
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15 ⁸ At oral argument, counsel for the Nation represented the primary harm to
16 the Nation was being deprived of its right to mediate pending a determination
17 by the mediator that the parties' dispute could not be resolved. To the extent the
18 Nation argues that failure to issue an injunction will result in financial harm to
19 the Nation if the State resumes collecting a fully loaded tax on off-reservation
20 fuel distributors before deliveries are made to the Yakima Nation Reservation, it
21 appears any such harm could ultimately be remedied by an award of damages
22 (refund of any improperly collected taxes due to termination of the Consent
23 Decree). That said, it must be recognized this court has yet to make a final
24 determination that it will grant the declaratory and/or injunctive relief sought by
25 the State to confirm termination of the Consent Decree and to confirm the
26 Department of Licensing's right to assess taxes on off-reservation fuel
27 purchases by the Yakima Nation.
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1 exercises its discretion under LR 7.1(h)(3)(B)(iii) to hear that motion without
2 oral argument. The motion involves issues which have already been adequately
3 orally argued in conjunction with Plaintiffs' motion for preliminary injunction
4 and the Yakama Nation's cross-motion for preliminary injunction.

5 **IT IS SO ORDERED.** The District Court Executive is directed to
6 forward copies of this order to counsel of record.

7 **DATED** this 11th day of February, 2013.

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9 *s/Lonny R. Suko*

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LONNY R. SUKO
United States District Court Judge